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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

LYDIA SANTIAGO, as personal representative of the Estate of Jaime Santiago,

Petitioner,

v.

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANGL, and DENNIS DANNER,

Respondents.

On Petition for Writ of Certiorari
to the Court of Appeals
of the State of Wisconsin

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING WRIT

This case involves procedural due process allegations to which settled law applies. No novel theory of law is

presented. This is at most a fact-bound case.

Petitioner sets forth a cascading set of three issues, each dependent on his success on the preceding issue. Unfortunately for clarity, petitioner presents the issues in reverse order. In correct order, to succeed on his CRC liberty interest theory, petitioner must first succeed on his Random and Unauthorized issue. However, to get to that issue, he must first overcome his waiver of due process issues by failing to raise them in the first place.

Petitioner's "FACTS"[1] cloud the time line and the respondents' actions. One

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[1]A significant omission is that Santiago received a rehearing of the charges and was found not guilty of the policies and procedures charge, but guilty on the disruptive conduct charge. This is a critical omission regarding petitioner's random and unauthorized argument.

could conclude from petitioner's facts that respondents pulled Santiago out of his CRC placement at the Plymouth Nursing Home (Plymouth), transferred him to the Waupun Correctional Institution (WCI), and then terminated his CRC status. In reality, the respondents were neither involved in his transfer from Plymouth to WCI nor in the termination of his CRC status. With these facts clarified, this case becomes minerun procedural due process and not worthy of review.

The chronology is critical. On June 18, 1992, Santiago was involved in an altercation with a cook at Plymouth. This altercation was the culmination of a long series of misconduct by Santiago at Plymouth and caused the Plymouth administrator to inform DOC personnel on June 19, 1992, that she was terminating

Santiago's placement at Plymouth and he must be removed from the facility.

Santiago was removed from Plymouth on June 19, 1992, and transported to the University of Wisconsin Hospital for evaluation. On June 20, 1992, Santiago was transferred to WCI.

The conduct report covering the altercation was not even written until June 29, 1996, and then served on Santiago at WCI on July 1, 1992. The conduct report hearing took place at WCI on July 20, 1992. These respondents' actions with regard to hearing this conduct report had no relation to Santiago's removal from Plymouth and transfer to WCI. Santiago was already at WCI when the conduct report was issued and heard.

These respondents -- Ware, the security director who processed the

conduct report initially; Zangl, the hearing officer; and Danner, the administrative appeal cfficer -- likewise had no role in Santiago's termination from the CRC program. This decision was made by a Program Review Committee (PRC) after the disciplinary hearing was completed. None of the respondents was on the PRC.

Respondent Zangl had referred Santiago to the PRC at the end of the disciplinary hearing. Such referral is not however a disciplinary consequence. See, Wis. Admin. Code ch. DOC 303.84. PRC referral does not mandate any particular result. In fact, referral to a PRC is so routine that it can be done at anytime by any staff member or the inmate himself. DOC 302.18(3)(b). The PRC had total discretion to do whatever it wished regarding Santiago's status using the

criteria of DOC 302.14 and 302.16. See, DOC 302.19(6).

I. PETITIONER'S FAILURE TO RAISE DUE PROCESS ISSUES IN HIS ADMINISTRATIVE APPEAL WAIVED THESE ISSUES.

It is uncontroverted that petitioner failed to raise any due process issues in his administrative appeal to the warden after his disciplinary hearing. The court of appeals applied "without hesitation", the waiver doctrine to administrative appeals in the prison setting. While a state need not give its prisoners a right of administrative appeal from disciplinary decisions, Wisconsin affords prisoners more process than the 14th amendment requires. The procedure for major violation hearings includes the right of administrative appeal. In that sense, an

administrative appeal is an extension of the disciplinary hearing.

While petitioner claims that the court of appeals "created a broad new doctrine of waiver," such is not the case. To hold otherwise would undermine the administrative mechanisms of the Department of Corrections for resolving disputes within its penal institutions. There is no difference between an inmate waiving his appearance before a disciplinary hearing and then being precluded from attacking the adjudication as a violation of his constitutional rights[2] and an inmate filing an administrative appeal, which is part of

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[2]See Howard v. Wilkerson, 768 F. Supp. 1002, 1006 (S.D.N.Y. 1991). See also Ghana v. Fauver, No. 85-3545, 1989 Westlaw 61872 (Dist. N.J. June 9, 1989), affirmed 887 F.2d 261 (3rd Cir. 1989); Morgan v. Ward, 699 F. Supp. 1025, 1044 (N.D.N.Y. 1988).

the disciplinary process, and failing to raise issues he later claims were violative of his rights.

II. EVEN IF PETITIONER OVERCOMES HIS WAIVER, THE "RANDOM AND UNAUTHORIZED" DOCTRINE PRECLUDES § 1983 LIABILITY.

Petitioner attempts to breathe life into his claim by arguing that the Random and Unauthorized Doctrine does not apply to the finding of guilt as to the policies and procedures charge. Petitioner's intricate argument, however, neglects its most basic underpinning: it fails to mention that petitioner received a rehearing on the conduct report in question and was found not guilty of policies and procedures. As stated by Judge Sundby in his court of appeals concurrence, "[t]here is no cause of action for an aborted denial of procedural

due process as long as the mistake is corrected before there is a loss of liberty . . . here the deprivation did not occur until after Santiago had been given all the process he was due."

In the final analysis, as to the policies and procedures charge, the disciplinary process righted itself and there was no impact on petitioner of any kind as a result of the initial guilty finding.

In any event, the Random and Unauthorized Doctrine applies to the facts of this case. Wis. Admin. Code § DOC 303.76(6) established a duty on the hearing officer and administrative appeals officer to meet the preponderance of evidence standard before finding Santiago guilty. Their conduct violating that duty was random and unauthorized. The sanction

of a ten day extension of mandatory release date could have been reviewed by way of state court certiorari. This Santiago failed to do. Certiorari review would have provided an adequate remedy because the circuit court could have restored any lost good time and expunged his disciplinary record.

III. CRC AND LIBERTY INTEREST.

Even if the issue of whether an inmate in CRC status in Wisconsin has a liberty interest in remaining in that status is reached, this is not the case to address that issue. As set forth in the introduction to this response, these respondents had absolutely nothing to do with Santiago's removal from the nursing home and transfer to the Waupun Correctional Institution. Further, none

of these respondents was on the program review committee which terminated his CRC status. Here Santiago was merely referred to the program review committee at the end of the disciplinary hearing. Hardly an atypical or significant deprivation. In fact, no deprivation at all. The PRC, pursuant to Wisconsin Administrative Code, has total discretion to do whatever it wished regarding Santiago's status, using the various criteria of the Administrative Code. The referral to the PRC did not mandate any particular result.

Respondents' actions were simply too remote and too attenuated to create personal liability under 42 U.S.C. 1983. The petition would make this respondents surrogates for matters happening to Santiago before and after their involvement. 42 U.S.C. creates a cause of

action based on personal liability and predicated on fault. An individual cannot be held liable unless he caused or participated in an unconstitutional deprivation of rights. Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983).

CONCLUSION

This court should deny the petition for writ of certiorari.

Dated this 21 day of April, 1997.

Respectfully submitted,

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